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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 243

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

PAUL GIBBS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S BRIEF

OPINIONS BELOW

The Sixth Circuit's[1] opinion (R. 524-540) is reported at 343 F. 2d 609 (1965).

The District Court's[2] opinion on Petitioner's motion to dismiss (R. 24-30a) is unreported. Its opinion on Petitioner's motion for judgment N.O.V. or a new trial (R. 42-58a) is reported at 220 F. Supp. 871 (E.D. Tenn., 1963).

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[1] Reference is to the United States Court of Appeals for the Sixth Circuit.

[2] Reference is to the United States District Court for the Eastern District of Tennessee, Southern Division.

JURISDICTION

The Sixth Circuit's judgment was entered April 6, 1965 (R. 540). Petition for a writ of certiorari was filed June 10, 1965, and granted October 11, 1965 (R. 541). This Court has jurisdiction under 28 USC, Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. In an action for damages against a labor union in which plaintiff alleged that acts which occurred during a labor dispute constituted a violation of Section 303 of the Labor Management Relations Act, 1947, and a violation of state law, did the District Court have pendent jurisdiction of the non-federal claim?

2. Where in the course of a labor dispute, a parent union assumes the direction of picketing theretofore commenced by a local union notwithstanding the doctrine of federal preemption, and insists upon and achieves order, is the parent union liable under state law for prior violence, in the absence of clear proof of its participation in or authorization of such violence, or its ratification thereof after actual knowledge of the violence?

3. Where an appeal to prejudice in jury argument on matters unrelated to the evidence was found to have materially affected the verdict, was it proper, in light of the indiscriminate and extensive nature of the appeal to prejudice, to cure the verdict by remittitur rather than a new trial, on the theory that the appeal to prejudice was "calculated to influence the size of a favorable verdict (for the plaintiff) without affecting the determination on the merits"?

4. Where a verdict of damages is based upon a finding of liability under Section 303 of the Labor Management Relations Act, 1947, and state common law, and where damages recoverable under the two theories are not nec-

essarily the same and it is impossible to ascertain to what extent the jury relied on one theory or the other in assessing the award of damages, and where it is found that the action was erroneously submitted to the jury on the Section 303 claim, may the verdict be upheld on the sole basis of the common law claim?

STATUTES INVOLVED

The statutory provisions involved are Sections 8(b)(4) and 303 of the Labor Management Relations Act, 1947, as amended, 61 Stat. 158, 73 Stat. 545, 29 USC §§ 158(b)(4) and 187; and Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 USC § 106.[3]

STATEMENT OF THE CASE

A. THE KIND OF ACTION AND THE DECISIONS AND JUDGMENTS OF THE DISTRICT COURT AND COURT OF APPEALS

Respondent, Paul Gibbs, a resident of Tennessee, instituted suit in the District Court against United Mine Workers of America[4] for $250,000 in compensatory damages and $100,000 in punitive damages.

Gibbs charged UMW with having violated Taft-Hartley's Section 303 and also with having engaged in a "conspiracy" in violation of Tennessee common law (R. 10-14a, 20a, 23a, 30a). Gibbs alleged he had been employed by Grundy Mining Company to superintend coal mines to be opened in Marion County, Tennessee, and that he had been engaged by the same company as an independent contractor to haul coal by truck from such mines. He charged that UMW, upon learning the mines were to open, formed a picket line near the mine site, and by acts of violence,

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[3] The statutes involved are sometimes referred to herein as *Taft-Hartley* and *Norris-LaGuardia* and pertinent provisions thereof are set forth in Appendix A to this brief (p. 1, et seq.).

[4] Herein called "UMW" or "defendant".

prevented him and Grundy employees from going to work. Gibbs also alleged that UMW told others with whom Grundy and Gibbs were doing business they would suffer a similar fate if they did business with either of them (R. 13a) and that UMW induced "other employees of neutral employers as well as other persons not to do business with the plaintiff, Paul Gibbs" (R. 23-24a).

At a pre-trial conference (R. 20a) and by motion to dismiss, (R. 23a) UMW challenged the District Court's jurisdiction to determine the alleged common law claim. UMW's motion to dismiss, however, was overruled (R. 24-30a) on the theory that a violation of Section 303 could be "inferred" from the complaint and accordingly, under *Hurn* v. *Oursler*, 289 US 238 (1933) the Court would have ancillary or pendent jurisdiction of the common law allegations.

In its answer (R. 15a-17a) UMW again denied the District Court had jurisdiction over the subject matter of the controversy and denied also the complaint's material allegations.

The case was tried to a jury. At the close of the evidence UMW moved for a directed verdict on the ground that there was no evidence to sustain Gibbs' claim of UMW's inducement of certain neutral employers to cease doing business with Gibbs in violation of Section 303—to wit, employers George Ramsey, Tennessee Products and Chemical Corporation and Tennessee Consolidated Coal Company. The Motion was sustained (R. 66-71a). The case, however, was submitted to the jury with respect to Gibbs' contention that UMW wrongfully induced Grundy Mining Company to cease doing business with him and also with respect to the alleged cause of action under Tennessee common law (R. 66-67a, 71-72a). Special issues or interrogatories were submitted to the jury. By its verdict the jury found that UMW had violated both Section 303 and state law, damaging Gibbs as a supervisor for Grundy

Mining Company by $60,000, and as an independent trucker by $14,500. In addition the jury found Gibbs entitled to $100,000 in punitive damages (R. 31a-34a).

UMW filed a timely motion for judgment in accordance with its motion for a directed verdict or in the alternative for a new trial (R. 34-41a, 67-72a). Upon consideration of the motion the District Court held as follows (R. 42a-58a):

(1) It set aside the verdict awarding damages to Gibbs under Section 303 for loss of employment as a superintendent with the Grundy Mining Company. The District Court found there "clearly existed a primary dispute between UMW and Grundy" and, noting the statute expressly protects primary strikes and primary picketing, it held that "employees and supervisors of any struck or picketed primary employer who may lose their employment are not within the meaning of 'other persons' (as it appears in Section 303) and would have no statutory action for any loss so occasioned" (R. 53-54a).

(2) The District Court refused to set aside the verdict finding a Section 303 violation with respect to Gibbs' claim as an independent trucker for Grundy Mining Company. In reaching this conclusion the District Court noted that the jury found "an object of the picketing of Grundy was to cause it to cease employment of Gibbs", and held that Gibbs, as a trucker as distinguished from his other position of supervisor, was an independent contractor and therefore within the term "other persons" as found in Section 303 (R. 54a).

(3) The District Court nevertheless sustained UMW's motion for directed verdict with respect to Gibbs' claim as an independent trucker under both federal and state law because "The record is devoid of any evidence" of damages to Gibbs as an independent trucker. The District Court thus set aside the verdict in this regard which was in the amount of $14,500.

(4) It found the evidence sufficient to support the jury finding of common law conspiracy (R. 57a).

(5) It found that the closing argument of Gibbs' counsel was improper.[5] The District Court said the argument was "not so prejudicial as to warrant a new trial" but that it "should be taken into consideration by the Court upon the issue of excessiveness of the verdict" (R. 56a).

(6) The District Court found the award of compensatory damages for loss of employment as superintendent, which was in the amount of $60,000, was excessive to the extent of $30,000; and the verdict for punitive damages in the amount of $100,000 was excessive to the extent of $55,000. It suggested a remittitur in these amounts.

The suggested remittitur was accepted and judgment against UMW for $75,000 in accordance with the District Court's opinion was entered on August 26, 1963 (R. 59a-60a). Gibbs and UMW each filed a notice of appeal on September 25, 1963 (R. 62a-63a).

On appeal, the judgment was affirmed by the Sixth Circuit (R. 524-540a). To the extent material here the Sixth Circuit held as follows:[6]

(1) It found it unnecessary to determine whether a violation of Section 303 had been committed. The Court said, ". . . the federal questions presented by plaintiff's pleadings and proofs were not so 'plainly unsubstantial' as to destroy federal jurisdiction". And continuing, it held, under *Hurn* v. *Oursler*, 289 US 238 (1933), that federal jur-

[5] The argument is found at pages 481-493a of the Transcript of Record.

[6] Gibbs appeal was from the finding of the District Court that there was no evidence to support the jury's verdict for damages in the amount of $14,500 with respect to his claim as an independent trucker. The Sixth Circuit agreed with this conclusion of the District Court and affirmed the judgment in this respect.

isdiction having attached, the jury was permitted to consider whether a Tennessee common-law tort had been committed. On this point the Sixth Circuit concluded that the "jury's express determination that such a tort had indeed been committed is sufficient to sustain its award of damages, so we find no need to review its determination of the secondary boycott claims" (R. 532-533a). This conclusion is discussed under Question No. One.

(2) The Sixth Circuit found that federal preemption did not foreclose action under state common law. It found that "violence was a part of the common law tort involved" and that the case was comparable to *San Diego Building Trades Council* v. *Garmon*, 359 US 236 (1959), *United Automobile Workers* v. *Russell*, 356 US 634 (1958) and *United Construction Workers* v. *Laburnum*, 347 US 656 (1954) and distinguishable from *Teamsters Local 20* v. *Morton*, 377 US 252 (1964) (R. 534-535a). It found that although the proof was "sketchy" UMW was responsible for the illegal conduct. This conclusion is the subject of our Question No. Two.

(3) It held that the impropriety in the closing argument of Gibbs' Counsel fell "within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits", and therefore that it was within the discretion of the District Court to employ a remittitur to avoid an excessive verdict. (R. 535-537). This conclusion is discussed in our Question No. Three.

(4) The Sixth Circuit did not expressly consider UMW's contention that the verdict for damages, which was based upon two theories, could not be sustained where it was subsequently determined that one of the theories was erroneous. The affirmance of the judgment thus was effective to deny this contention. This conclusion is the subject of Question No. Four herein.

B. STATEMENT OF THE EVIDENCE

1. Introduction

This case has its setting in Marion and Grundy Counties in Southern Tennessee. During the period material to this case the coal lands in this area were worked by two major companies, Tennessee Consolidated Coal Company ("Tennessee Consolidated") and Tennessee Products and Chemical Corporation ("Tennessee Products"), and a number of smaller coal operators (R. 89a-90a). Prior to the incidents here involved most of the mines, including those of the two major companies, operated under collective bargaining contracts with UMW (R. 95a-96a, 319a).

In the area UMW had chartered a number of local unions, including locals 5881 and 7083—whose membership was made up of employees of Tennessee Consolidated (Local 5881) and employees of operators operating the so-called "pocket" mines under lease or contract with Tennessee Consolidated (Local 7083).

For several years Tennessee Consolidated operated its major mine — the Coal Valley Mine — with TVA as its major customer. Effective December 31, 1959, however, TVA cancelled its coal purchase contract with Tennessee Consolidated.[7] About two weeks later Tennessee Consolidated gave UMW a sixty-day notice of cancellation of its collective bargaining agreement with UMW. Negotiations followed but failed to result in a new contract and the Coal Valley Mine closed March 15, 1963. This resulted in the unemployment of more than one hundred Coal Valley miners (R. 227a, 235a-237a, 296a-297a, 319a).

Perhaps a year before this a Tennessee Consolidated official, Paul Callis, had assembled the Coal Valley miners

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[7] Tennessee Consolidated had a subsidiary or affiliate corporation, Whitwell Coal Corporation, which conducted a strip mine in the area. The TVA contract being filled by Whitwell was not cancelled and Whitwell, under UMW contract, continued in operation throughout the period involved (R. 325a-327a).

and spoke of the possibility of the exhaustion of the Coal Valley mine and told the miners that the company's next mine operation would be in the nearby Gray's Creek area and that Coal Valley miners would be transferred to that operation (R. 304a, 393a-394a, 425a).

2. Paul Gibbs

Paul Gibbs was the operator of small hand loading coal mines under a sub-lease or contract with Tennessee Products and under a collective bargaining contract with UMW (R. 89a-91a, 94a, 135a). He trucked the coal to various points by his own trucks. His trucking operations were by and large confined to hauling coal he mined, but in 1960 he also trucked coal for another operator, Pikeville Coal Company (R. 89a-92a, 137a-139a). Before the incident involved in this case Gibbs had no business relationship with Tennessee Consolidated or Grundy Mining Company (R. 137a).

3. The Organization of Grundy Mining Company: The Decision to Open Gray's Creek Mines

After failing to negotiate a new agreement for the Coal Valley mine with UMW, Tennessee Consolidated formed the Grundy Mining Company, a wholly owned subsidiary of Tennessee Consolidated, to open a number of small mines in the "Gray's Creek" section of its property. Grundy's President was Judson Harwood, Tennessee Consolidated's lawyer. Grundy's other officers were the officers of Tennessee Consolidated (R. 193a-195a). Grundy Mining Co. was unknown to area miners, including Gibbs (R. 142a, 337a).

Ignoring the seniority built up by Tennessee Consolidated's Coal Valley mine's employees and its promise to those employees of the Gray's Creek work and without prior notice to UMW, Harwood phoned Gibbs on Friday, August 12, 1960, and offered him the job of opening some

mines at $600 per month. Gibbs told Harwood he would take the job if he could also have the contract to haul the coal from the mine. Harwood accepted, agreeing to pay 78¢ per ton for the hauling (R. 92a-94a).

Gibbs' conversation with Harwood was the only one he had with Tennessee Consolidated (or Grundy) officials prior to August 15 (R. 142a). From the conversation he knew that Coal Valley miners would *not* be employed or considered for the work. He did not know (even on the morning of August 15) who would man the job, except for two men he talked to, other than that Harwood had told him some forty men would be there (R. 99a-100a, 141a-143a). Grundy, with the assistance of the "Southern Labor Union", hired employees to work in the proposed mines on Saturday and Sunday before the scheduled Monday opening (R. 175a, 179a, 183a, 185-186a).[8]

On Saturday, August 13, rumor spread about the mining community that work was to commence at Gray's Creek. The news reached the unemployed Coal Valley miners (R. 393a, 416a, 320a, 457a). The president of their local union, UMW Local 5881, called a meeting for Sunday afternoon, which was attended by many of the members (R. 457a). Three members, after the meeting, decided to go to the proposed mine site the next morning. No representative of UMW or of District 19, United Mine Workers was present at the meeting. The District 19 representative in the area, George Gilbert, did not attend the meeting, and was not advised of it (R. 395a, 416-417a, 430-431a, 457a).

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[8] UMW charged Tennessee Consolidated with having unlawfully assisted Southern Labor Union in violation of Section 8(a) (2) of the National Labor Relations Act, 29 USC 158(a) (2), in this matter. The NLRB held that Tennessee Consolidated had so violated the Act, 131 NLRB 536, but the Sixth Circuit refused to enforce the Board's order. *NLRB* v. *Tennessee Consolidated Coal Co.*, (1962), 307 F. 2d. 374.

4. The Incidents of August 15 and 16 at Gray's Creek

Gibbs went alone to the proposed mine site on Monday, August 15. Soon thereafter three men arrived. These men were the Coal Valley miners who had decided at the local union meeting the day before to go to the mine site. They asked Gibbs if the mine was to open. He said he "heard" it was. There was no argument or disagreement of any kind. Gibbs left and spent the rest of the day at his nearby mines (R. 99-101a, 395-398a, 417-418a).

After Gibbs left, Johnny Cain, a Southern Labor Union organizer, and newly recruited employees, Dempsey Campbell and Willie Carl Fults, arrived at the proposed mine site (R. 177-178a, 185a). The Coal Valley miners told them that the Coal Valley men were to get the work (R. 398-399a). Cain claimed he was stopped from "going in" by "four to eight men", some of whom were armed (R. 151a). Other employees hired to start work for Grundy that morning lost their way and failed to reach the mine site (R. 101a, 180-181a).

The events of the following day, August 16, 1960, are the subject of considerable testimony. Gibbs said he arrived at the intersection of the Gray's Creek Road and "Pocket" Road (R. 75a) about 6:30 a.m. (R. 103a). Before his arrival, however, several of the men employed to work at the new mine had come to the intersection, where a large number of Coal Valley miners had gathered, and according to the testimony of the newly employed men, they were refused admittance and were rather unceremoniously chased away (R. 164-167a, 172-174a, 181-182a). Gibbs, arriving after the departure of the others, said he was threatened by the Coal Valley miners, including Walter Schrum, president of the local union (R. 103-109a, 140-141a). Gibbs went on to say that he, with Coal Valley miners to his front and rear, drove to a nearby road, where another group of miners was gathered about

John Cain, the Southern Labor Union organizer. According to Gibbs and Cain, Cain was struck by three of the men and the contents of Cain's briefcase were emptied and burned (R. 422a, 441a). Gibbs was not harmed. After a short time Cain, Gibbs and the others left; Gibbs went to his home (R. 458-459a, 422a, 441-444a, 108-109a, 152-154a).

5. The Evidence on the Issue of the Defendant's Responsibility for the Incidents of August 15 and 16

UMW is composed of intermediate subordinate branches, one of which, District 19, extends over part of Kentucky and Tennessee and is involved in this case. District 19 officials referred to in the record are James Ridings, President during the material period of this case, Albert Pass, Secretary-Treasurer, William Turnblazer, the present Acting President, and George Gilbert, District 19's field representative in the Southern Tennessee field in 1960. UMW stipulated that it was responsible for the actions of George Gilbert performed in the course and scope of his employment (R. 127a).

As stated above, the Sixth Circuit, although noting the proof was "sketchy as to defendant's responsibility", found UMW responsible for the violence of August 16. It held there was evidence from which the jury could have inferred that Gilbert had a part in the events of that day (R. 529-530a). This evidence was the trial testimony of Gibbs, who was asked whether he saw any officials of the International Union on August 15 or 16 in the Gray's Creek area. He replied (R. 126-127a): "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went I don't know." In response to a question as to what part Gilbert played in the activities, Gibbs said (R. 127a): "... he didn't play any part that I seen." This testimony is in conflict with Gibbs' pre-trial testimony, read in evidence by UMW (R. 479-480a). Gibbs' testimony, as we herein-

after discuss, was not relied upon by the District Court in this regard in its opinion nor was it relied upon by Gibbs in brief or argument in the Court of Appeals. Apart from the foregoing, the evidence is that Gilbert was not present on August 15 or 16 and that neither Gilbert nor any other District 19 representative authorized or suggested to members or officers of Local 5881 to forcibly prevent work or to picket at Gray's Creek on those days. No representative or officer of District 19 had knowledge of the existence of Grundy Mining Company or of the intention of Tennessee Consolidated (or Grundy) to open mines in the area at that time (R. 303-304a, 319a, 337a, 340-341a, 472-477a, 402a, 461-462a).

Gilbert accompanied by Bryan Parmlee, an officer of another UMW local in the area, had left Saturday, August 13, for District 19 headquarters at Middlesboro, Kentucky, where Gilbert was scheduled to attend a District Executive Board meeting. Parmlee was there to attend to routine matters for his local (R. 326-328a, 350-352a).

This uncontradicted evidence is verified by the testimony of Pass and Turnblazer (R. 297-298a, 471-472a).

The District's first information of the incident came Tuesday morning, the 16th, when a Local 5881 committeeman, telephoned Pass and told him that men were trying to take their jobs and that there was picketing at Gray's Creek. Pass, Ridings and Gilbert discussed the situation later that morning, and Gilbert was instructed to investigate and report back, to keep the pickets few in number and to make certain that the picketing did not result in a work stoppage at other mines located on Tennessee Consolidated's and Tennessee Products' property in the area. Gilbert and Parmlee left Middlesboro about 1:00 p.m. on the 16th and arrived at Gilbert's home in Jasper, Tennessee at 5:00 p.m. (R. 298-301a, 310-311a, 327-329a, 337a, 352-353a, 472-473a).

6. The Continuation of the Picketing at Gray's Creek

Following the incidents of August 15 and 16 members of Local 5881—all long-time employees of Tennessee Consolidated, Grundy's parent corporation—maintained pickets at the Gray's Creek mine until May, 1961 (R. 332-333a, 382-383a) when, as is hereinafter discussed, the Coal Valley mine was reopened and they or many of them were re-employed.

Gilbert, upon his return from Middlesboro, contacted leaders in Local 5881, and instructed them to maintain order and limit their pickets to three (R. 408-409a, 424-433a, 461-462a). Gilbert explained it took time to get this accomplished but that within days the pickets were so limited. He also instructed the pickets not to picket other mines operating in the area (R. 332-334a). Other area mines continued to operate, including Gibb's mine at Tennessee Products, even though the employees at those mines were union members and passed by the pickets on their way to work (R. 334-335a, 383-384a, 444-445a, 450-451a).

On August 22 or 23, William Turnblazer, of District 19, was sent to the area by District President Ridings. He testified (R. 473a):

> "... I explained to them that the labor board was there investigating and that certainly any mass picketing would only cause them a great deal of trouble, and instructed them that they should limit the number of their pickets and under no circumstances have any violence or any threats of violence to any person coming into or near that area."[9]

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[9] Charges were filed by Tennessee Consolidated and Grundy of violation of Section 8(b)(1)A of the National Labor Relations Act, 29 USC 158(b)(1)(A), with respect to the events of August 15 and 16. A complaint issued against Local 5881 (though not against UMW or District 19) and the Board found that the violation had occurred. See *Local Union 5881, UMWA and Grundy Mining Co.*, 130 NLRB 1181 (1961).

The attitude of District 19 is further indicated by Mr. Turnblazer in his answer to a question on cross-examination (R. 476a):

> "Q. Now, sir, what contractual right, if any, did your union have to forcefully stop this Mr. Paul Gibbs from going to work the morning of the 16th of August, 1960?
>
> "A. They had no right to forcibly, contractually or under the law, Mr. Van Derveer. Those employees had been promised that work by Mr. Gibbs' employer, Grundy, and Tennessee Consolidated, and that's why they were there. We tried to keep down the trouble, we did keep down the trouble, and the situation there remains that we think those employees are entitled to those rights, and we will assist them, but not through acts of violence or threats of violence."

Turnblazer testified that he knew of no disturbance that occurred on the picket line after that date or after August 16 (R. 473a). He said the union and he, personally, had done all within their power to maintain order on the picket line (R. 475-477a).

The record is barren of evidence of unlawful conduct or any evidence which indicates that after August 16 the picketing was other than orderly. During the following months there were but three pickets at a time at Gray's Creek (R. 384a, 405-406a, 424-425a, 433-434a, 444a). Grundy never sought to open the mines after August 16. There is no evidence in the record that Grundy or Gibbs was threatenend as to the opening of the mines after August 16.

There is evidence that Paul Callis, a Grundy official, was accosted and cursed at their commissary on August 17 by M. L. Guerry. Guerry, a sometime coal miner who had been employed as a night watchman at the commissary, was apparently drunk at the time and was angered by an investigation of missing property which he felt was a reflection on his character. He later apologized. No rep-

resentatives of the defendant union were present nor is there any evidence in the record that they were even advised of the incident. The incident was described as occurring in the midst of a great throng of armed coal miners. Gibbs was not present (R. 232-233a, 247-249a, 386a, 404-405a, 433a).

Beginning in November, 1960, District 19 provided weekly grocery orders in the amount of $25.00 to Coal Valley miners whose unemployment compensation was then exhausted and who were otherwise without income. Some of those present on August 16 received such grocery money as well as those who picketed Grundy thereafter, but picketing was not a requirement for the grocery orders (R. 134a, 300-303a).[10]

7. Objectives of the Picketing

The record establishes that the object of the pickets was to get for themselves the jobs they felt they deserved. Harvey Brown testified, "We was out there trying to protect our livelihood, as had been promised to the men, working there all their lives, working for Tennessee Consolidated Coal Company" (R. 435a). Robbie Vance described it this way: "Well, we had been promised that work by the Consolidated Coal Company, down in that section, and it was the only thing in the world that we had to live at. Since we had been there all our lives and everything, we felt like the work actually was ours, was Consolidated's property, and we was just asking for a living out of it, that's all." (R. 445a) Other testimony to the same

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[10] District 19 was not the only source of aid given to the Coal Valley miners. Gilbert testified, ". . . at first, there was quite a few operators, foremans that worked at the Coal Valley mine, merchants, the whole community was behind these boys. They thought they was within their rights for holding out for that job, and they give them food from all stores, grocery stores in that area, and they gave money—operators, politicians, everybody that passed was in sympathy with them and kept them going" (R. 336a).

effect was given by Walter Schrum (R. 460a, 461a), H. D. Ross (R. 387a), Clarence McGovern (394a, 402a) and William Turnblazer (R. 475-477a).

Gibbs testified that on August 18 he telephoned Gilbert. Gibbs said he had understood Gilbert was to have met him at the Monteagle Cemetery and didn't show up and that he called Gilbert to find out why. According to Gibbs, Gilbert said he was too busy, and that he wanted him to "keep his damn hands off that Gray's Creek area over there", and "to tell that Southern Labor Union that we don't intend for you to work that mine" (R. 127-129a).

Jim Campbell, a coal operator, testified he had gone to Gilbert's house on the afternoon of August 17, 1960. According to Campbell, Gilbert said Gibbs was trying to bring in the Southern Labor Union and the union wouldn't let him do it. Gilbert further said, according to Campbell, that Gibbs was going to have to go and that he, Gilbert, had friends in high places that could move him out (R. 257-258a).

John Higgins testified he talked to Gilbert about the time the "new union" was going in, or while the picket line was on, and that Gilbert had said, ". . . we can't let that go on . . . it would all be like that," and also that "Paul was trying this other union in there and . . . he ain't going to get by with it" (R. 218-219a).[11]

Samuel Swope, a salesman, testified that he was in the area on August 22, 1960. He said he saw a group of men around a tent about 50 yards off Highway 108 and a rifle laying against a log. He also testified that he saw Gilbert nearby and asked Gilbert if he could get to the strip operations of the Whitwell Coal Company and Gilbert said he could "go down through the pocket and turn to the right at a coal tipple and there would be

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[11] Gilbert's testimony concerning statements of Gibbs, Campbell and Higgins is found in the Transcript of Record at pages 328-332a and 337-339a.

some of his men there for us to tell them that he said it was all right to go through'' (R. 160-161a).

The fact that Gibbs owned and operated trucks and had an agreement to truck coal from Grundy when it got into production played no part in the dispute (R. 122-123a). UMW did not know Gibbs had a trucking contract with Grundy, nor did UMW have any dispute with Gibbs either as an operator or as a trucking contractor. He was under contract with UMW and there was no dispute at his mines or with his truck drivers.

In the spring of 1961, after the Coal Valley miners had been picketing at the entrance to the proposed Gray's Creek mines for eight months, Tennessee Consolidated engaged Allen and Garcia, an engineering firm, to reopen and operate the Coal Valley Mine. Allen and Garcia entered into a contract with UMW and the Coal Valley miners were reemployed. The picketing at Gray's Creek ceased, but neither Tennessee Consolidated nor its subsidiary, Grundy, pursued development of mines in the Gray's Creek area (R. 237-9a, 305-7a, 473-4a).

8. The Opening of Mines in Gray's Creek

In June, 1962, the reopened Coal Valley mine ran into a fault and a part of the mine caved in. Operations there were abandoned and at that time (well after the institution of the instant case) a mechanized mine was opened in Gray's Creek. The equipment at the Coal Valley mine was moved to the new mine and the Coal Valley miners were transferred to this operation. This work was done be Allen and Garcia under its contract with Tennessee Consolidated. Allen and Garcia withdrew from its agreement with Tennessee Consolidated in late summer, 1962, and gave UMW a sixty-day notice of contract cancellation, which contract thus ended October 24, 1962, a few days before trial in the Gibbs case. UMW was notified that the operation would be continued by Grundy, and Grundy and District 19 officials agreed that the collective bargaining agreement would be considered in effect until

the October 24 termination date. Thereafter UMW and Grundy undertook to negotiate a new contract. These negotiations were underway at the time of trial. In the meantime Grundy opened some seven or eight small non-mechanized mines in Gray's Creek (R. 206-14a, 237-243a, 305a, 388-91a, 473-77a).

SUMMARY OF ARGUMENT

I.

In this, an action for damages growing out of a labor dispute between a union and an employer engaged in commerce, jurisdiction was founded on and damages were sought under Section 303 of the Labor Management Relations Act.[12] Damages were also sought on the basis of an alleged state common law cause of action conjoined with the asserted federal cause of action.

The Sixth Circuit found it unnecessary to determine whether the claim under Section 303 had merit either in fact or law. That Court found the assertion of the federal claim was sufficient to vest the District Court with jurisdiction of the non-federal claim.

The Sixth Circuit's approval of federal jurisdiction over the non-federal claim asserted herein improperly implemented the doctrine of pendent jurisdiction as enunciated in *Hurn* v. *Oursler*, 289 US 238 (1933).

Pendent jurisdiction should not have been exercised because the federal and state claims are not merely distinct grounds of a single cause of action; they are separate and distinct causes of action. A cause of action relates to the violation of a *right*, *Baltimore S.S. Co.* v. *Phillips*, 274 US 316 (1927) and, plainly, the right pro-

[12] Jurisdiction was also alleged in the complaint on the theory of diversity of citizenship. The District Court rejected the diversity theory on UMW's motion to dismiss, and this ground of jurisdiction was not thereafter pressed (R. 25a). The disposition of this question accords with this Court's decision in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, —— U.S. ——, 34 LW 4019 (1965).

tected by Section 303 and the right protected from common law conspiracy and interference are different in concept and scope. Section 303 was narrowly conceived, as shown by legislative history and the statute itself, and makes actionable secondary activity against "other" persons with whom an employer-disputant is doing business. Section 303 does not give assurance that an employer will be free of union activity "by means other than those proscribed". *Local 1976, United Bro. of Carpenters* v. *NLRB,* 357 US 93, 99 (1958). Common law interference, on the other hand, condemns *all* invasions of contractual relationships by unlawful means.

The federal and state claims are also to be considered separate and distinct causes of action because there are substantial and material differences in the facts relating to the respective claims. A partial coincidence of facts does not establish a single cause of action, hence pendent jurisdiction may not be exercised. In these circumstances, absent diversity of citizenship, federal courts are without authority to enforce state laws, and conduct "however reprehensible, does not give the federal courts jurisdiction". *Apex Hosiery Co.* v. *Leader,* 310 US 469 (1946), *Hunt* v. *Crumboch,* 325 US 821 (1945).

Moreover it was error to invoke pendent jurisdiction of the non-federal claim because the federal claim asserted was wholly unsubstantial. *Bell* v. *Hood,* 327 US 678 (1946). Picketing at the job site for the purpose of protecting job rights and to obtain a collective bargaining agreement is not proscribed by Seciton 303 and contrary arguments have been foreclosed by decisions of this Court, *Local 761, IUE* v. *NLRB,* 366 US 667 (1961); *United Steelworkers* v. *NLRB,* 376 US 492 (1964). The pickets were without knowledge of Gibbs' engagement as an independent contractor hence it was impossible for them to have had the intent or specific objective required in a Section 303 action. *Local 1976, United Brotherhood of Carpenters* v. *NLRB,* 357 US 93, 98 (1958).

II.

The judgment based on state law is contrary to the principle of federal preemption.

In the instant case members of UMW, unemployed because of the failure of their employer and UMW to agree upon a collective bargaining agreement, commenced picketing, without UMW's knowledge or authorization, when their employer sought in effect, to replace them with employees recruited by a rival union. The picketing was marked by violence in its initial stages.

It was error, nonetheless, to impose judgment against UMW under state law for, contrary to the Sixth Circuit's findings, there is neither clear proof of UMW's participation in or ratification of the violence, as required by Section 6 of the Norris-LaGuardia Act, *United Brotherhood of Carpenters and Joiners* v. *U. S.*, 330 US 395, nor substantial evidence of UMW's responsibility under any standard of evidence.

The occurrence of violence does not permit application of state law to non-violence aspects of a labor dispute. *Youngdahl* v. *Rainfair, Inc.*, 355 US 131 (1957).

UMW's role in the dispute was to maintain order at the picket line and to assist its members in securing claimed job rights and a collective bargaining agreement. UMW had lawful and proper reasons to involve itself in the picketing and an intention to ratify the prior violence may not be inferred from acts which may be readily explained without involving any intention to ratify. The elements of ratification are lacking. 3 Am. Jur. 2d, Agency, Section 170. Because UMW did not participate or ratify the violence and because its conduct was within the regulatory scope of the Labor-Management Relations Act, a judgment for damages under state law may not stand. *San Diego Building Trades Council* v. *Garmon*, 359 US 236 (1959), *Teamsters Local 20* v. *Morton*, 377 US 252 (1964).

The judgment is an implicit use of the "totality of effort rule", in that acts beyond the power of a state to regulate were shown in evidence as a part of the common law cause of action. The judgment must therefore be reversed even if it appears that UMW was responsible for the violence for "the District Court was without power to award damages proximately caused by lawful primary activity, even though (a union) may have contemporarily engaged in unlawful acts elsewhere." *Teamsters Local 20 v. Morton*, 377 US 252 (1964). In fact, UMW asserts that federally proscribed violent secondary picketing preempts state law in this field because Congress provided damages for a Section 303 violation which is the missing ingredient this Court relied upon in *UAW* v. *Russell*, 356 US 634, and *UCW* v. *Laburnum Construction Corp.*, 347 US 656, to sustain state law.

III.

UMW is entitled to a new trial because of the nature of the closing argument to the jury of Gibbs' counsel. The argument was an indiscriminate appeal to prejudice particularly on matters not in evidence. The District Court properly held that counsel may not share "his client's prejudices" with the jury, (220 F. Supp. 871, 880) but erred in undertaking to cure the effect of the appeal by a remittitur. A litigant is entitled to a fair trial on all issues and such an appeal is as "effective to beget a wholly wrong verdict as to produce an excessive one." *Minneapolis, St. Paul & S.S.M. Railway* v. *Moquin*, 283 US 520, 521 (1931).

Moreover, it was error to find, as did the Sixth Circuit, that the offending remarks fell within "the very narrow category calculated to influence the size of a favorable verdict without affecting the determinations on the merits" (R. 536). The distinction made conflicts with the intended and manifest nature of the argument, which was addressed as much to the issue of liability as it was to the issue of damages. The distinction neither served the justice of the

case nor the requirements of the administration of justice as reflected in trial practice.

IV.

The verdict for damages, which was based upon two theories, may not be sustained where, as here, it was determined that one theory was erroneous and where it is impossible to determine which theory or to what extent each theory prompted the verdict on the damage issue. A new trial should be granted. *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products Co.*, 370 US 19 (1962).

ARGUMENT

Question No. One

The Courts Below Improperly Invoked the Doctrine of Pendent Jurisdiction In Adjudicating the Common Law Cause of Action

Finding that the cause of action asserted under Section 303 and the asserted cause of action under Tennessee common law "were merelydifferent grounds to support a single cause of action" (R. 533a), the Sixth Circuit sanctioned the exercise of pendent jurisdiction in the instant case and affirmed a judgment for damages based on state law.

The decision under review is one of a number of cases involving Petitioner in which the Sixth Circuit has approved the exercise of pendent jurisdiction.[18]

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[18] UMW v. Meadow Creek Coal Co., 263 F. 2d 52 (CA 6, 1959), cert. denied, 359 U.S. 1013 (1959); UMW v. Osborne Mining Co., 279 F. 2d 716 (CA 6, 1960), cert. denied, 364 U.S. 881 (1960); Gilchrist v. UMW, 290 F. 2d 36 (CA 6, 1961), cert. denied, 368 U.S. 875 (1961); Flame Coal Co. v. UMW, 303 F. 2d 39 (CA 6, 1962), cert. denied, 371 U.S. 891 (1962); Sunfire Coal Co. v. UMW, 313 F. 2d 108 (CA 6, 1963), cert. denied, 375 U.S. 924 (1963); White Oak Coal Co. v. UMW, 318 F. 2d 591 (CA 6, 1963), cert. denied, 375 U.S. 966 (1964); Allen v. UMW, 319 F. 2d 594 (CA 6, 1963); Price v. UMW, 336 F. 2d 771 (CA 6, 1964), cert. denied, 85 S. Ct. 899, —— U.S. —— (1965).

These decisions have been based on *Hurn* v. *Oursler*, 289 US 238 (1933), generally recognized as a landmark case on the judicially created pendent jurisdiction doctrine. This Court there (p. 246) distinguished between "a case where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character". It went on to hold that where the federal question "is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground;* in the latter it may not do so upon the nonfederal *cause of action.*" (Emphasis the court's)

Hurn involved a federal claim for copyright infringement. The court found the asserted federal claim warranted a decision on the merits of a state law claim of unfair competition which was also alleged as a basis for recovery. Whether the use of the *Hurn* jurisdictional concept was originally intended to apply in other types of litigation, such an extension has developed.[14]

The determination of state law issues is, of course, often a matter of necessity in litigation in federal courts. *J. I. Case Co.* v. *Borak*, 377 US 426 (1964). As it has been construed the significance of *Hurn* is that jurisdiction of a federal court is not limited to a determination of only those state issues which are essential or necessary to a decision. In an appropriate case a federal court may decide a state law issue which is procedurally convenient for it to decide. This, of course, is the justification for the extension of the pendent jurisdiction doctrine. Difficulties have occurred, however, in determining which cases are appropriate, under *Hurn*, for the exercise of pendent jurisdiction. The requirements of *Hurn* are stated in terms

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[14] See, *"The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,"* 62 Col. L. Rev. 1018, 1021.

of a substantial federal question and a single cause of action. The illusive concept of what is a substantial federal cause of action, as distinguished from a cause of action which is not merely unfounded but also lacking in substance or color, and of what constitutes a separate cause of action as distinguished from a separate ground of a single cause of action, have resulted in decisions which are impossible to reconcile. According to one commentator, application of the *Hurn* standards

> "have been a source of constant difficulty and has led to close distinctions that hardly seem to have any bearing either on the general values that should govern in the administration of justice or the special value of avoiding federal intrusion in state spheres." [15]

Recently this Court, reviewing a case from the Sixth Circuit, in which common law claims were coupled to an action under Section 303, and in which a judgment for damages was affirmed under both federal and state law, stated that, "Pendent jurisdiction permits a federal court *under some circumstances* to determine a state cause of action which otherwise would have to be heard in the state court". (Emphasis ours) *Teamsters Local 20* v. *Morton*, 377 US 252, 257 (1964). It was quite evident, however, that the union conduct before this Court in *Morton* could not be proscribed by state law because of the doctrine of federal preemption, hence it was unnecessary for this court to determine to what extent, if any, the pendent jurisdiction doctrine would have authorized consideration of a non-preempted cause of action.

There are certain similarities in the *Morton* case and the instant case as well as the other UMW pendent jurisdiction cases cited and relied upon by the Sixth Circuit in holding in *Morton* that it had pendent jurisdiction. Even though the instant case contains evidence of vio-

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[15] See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemporary Problems, 216, 232 (1948).

lence which was lacking in *Morton*, we believe, for the reasons discussed in Question Two, preemption affords UMW a defense because the state cause of action included nonviolent permissible activity and violent secondary activity. The preemption question aside, however, we believe there was error in the exercise of pendent jurisdiction, for reasons we now discuss.

A threshold question lies in the identification of Gibbs' federal cause of action as distinguished from his state cause of action. We are told that a "cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Baltimore S.S. Co.* v. *Phillips*, 274 US 316 (1927). And in applying the standards which it announced, this Court in *Hurn* said the federal and state claims there involved "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." 289 US 238, 246.[16]

It is apparent that the right protected by a state cause of action of interference or conspiracy is far more inclusive than is the right protected by the federal cause of action under Section 303. Section 303, to be sure, prohibits a *form* of interference in a labor dispute. Repeated decisions of this court have held, however, that the "interference" proscribed by Section 303 or its counterpart, Section 8(b)(4), 29 USC 158(b)(4)[17] is that which is addressed to a secondary or neutral employer and not to the employer primarily involved in the labor dispute. *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 US 93, *United Steelworkers of America* v. *NLRB*, 376 US 492 (1964), *Local 761, Int'l Union of Electrical Workers* v. *NLRB*, 366 US

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[16] The cases of *Bell* v. *Hood*, 327 U.S. 678 (1946) and *Strachman* v. *Palmer*, 177 F. 2d 427 (1949), in which pendent jurisdiction was found, involved federal and non-federal claims of this type.

[17] Material provisions of Section 303 and Section 8(b)(4) are found in Appendix A to this brief.

667 (1961), *NLRB* v. *International Rice Milling Co.*, 341 US 665 (1951), *Teamsters Local 20* v. *Morton*, 377 US 252 (1964). In other words, the right protected under federal law is the right to be free from pressure addressed to third persons in a position to harm another by withholding a contractual advantage from him and the right of the third person not to be drawn into the dispute of another. Nor was the limited scope of Section 303 mere coincidence. Its enactment followed the rejection by the House and Senate Committee which reported out the Taft-Hartley Act, of a measure which would have vested jurisdiction in the federal courts to determine actions for damages based on practically every variety of interference which might occur during the course of a labor dispute.[18]

The limitations of Section 303 are to be contrasted with the breadth of Gibbs' state law claim. As the District Court charged the jury (R. 505a), "Under the common law a wrongful interference includes all invasions of contractual relationship by unlawful means, including an act injuring or destroying persons or property which retard or make more difficult or prevent performance or make performance of the contractual relationship less valuable to the parties thereto." The District Court also charged relative to the state causes of action, that a "conspiracy may be defined as an agreement between two or more organizations or associations . . . to do an unlawful thing, or to do a lawful thing by lawful means" (R. 507a).

The fundamental distinctions in the concept and purpose of the cause of action defined by Section 303 and that defined as common law interference and conspiracy, are apparent from these definitions.

As this court stated in *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 US 93, 99 (1958) an employer

[18] See House Bill 3020 (Legislative History of the Labor Management Relations Act, 1947, Vol. 1, pp. 158, 204). We have copied Section 12 of H.R. 3020 in Appendix B to this brief.

"has no absolute assurance (under federal law) that he will be free from the consequences" of union activity "by means other than those proscribed" in Section 303. It may be argued that an employer or an individual, such as Gibbs, has the right to be free from forms of interference other than those proscribed by Section 303, but that right derives from a different authority and it is different in concept and purpose, as we have shown, from the right created by Congress.

The distinction which is apparent in the definition of the right to be free of activity proscribed by Section 303 and the right to be free of, and that condemned as, common law interference, is equally apparent from the allegations of the complaint and the evidence. The federal and state claims here involved are not, in a factual sense, "different epithets to characterize the same group of facts". For example, in paragraph VI of the complaint, it is *expressly stated* that the picketing was commenced for the purpose of preventing men from taking jobs which the pickets claim as their own, and that this picketing occurred before "Gibbs arrived on the scene" (R. 12-13a). This picketing was alleged and was later shown in evidence as a part of Gibbs' cause of action and necessarily, we think, as a part of his state cause of action. Certainly picketing for the purpose of protecting claimed job rights, carried on at the situs of the work, is not secondary under the language of the statute or the decisions of this Court cited above.

Much of the evidence considered by the jury in deciding Gibbs' common law cause of action was equally without relevance to union activity prohibited by Section 303. The fact that picketing continued at the mine long after Gibbs ceased to be involved; the fact that UMW was seeking to obtain a new contract with Grundy or its parent corporation, Tennessee Consolidated Coal Company; the fact that UMW gave financial assistance to the men, again after Gibbs ceased to be involved; the fact that UMW obtained

a contract under which its members were re-employed; and the fact that Gibbs, after the cessation of picketing, was not given a lease by Tennessee Consolidated, were all vital parts of his common law cause of action.[19] The distinction between the rights protected by Section 303 and state law is best pointed up by Gibbs' counsel in his closing argument. Counsel argued UMW conspired to obtain a particular contract and this harmed Gibbs, Counsel stated (R. 484a):

> ". . . and here is the conspiracy. Mr. Pass testified, we want that contract all over this nation. That contract or better. I don't guess at that, there is his testimony. There is no deviation from that contract. Mr. Turnblazer so says, unless it is approved in Washington. They impose a nationwide contract all over this nation, all over. I don't care whether it is in Canada or West Virginia or California or Tennessee."

Obviously, as we think, none of these activities related to conduct proscribed by Section 303. And if Gibbs had rights which were violated by this conduct, they were rights derived from a non-federal source.

It is true that factual elements of the case relating primarily to the picketing and violence of August 16 were claimed as a basis by Gibbs for both his alleged federal and non-federal cause of action. But a partial coincidence of facts falls short of establishing a single cause of action. Indeed, though it is apparent from the *Hurn* decision that one of the claims advanced by the plaintiff in that case would have involved some facts common to other claims made in that case, it was dismissed on jurisdictional grounds.[20]

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[19] The facts here referred to are detailed at pages 14-18 in this brief.

[20] The *Hurn* case had three counts, one for the infringement of copyrighted play under federal law, a second based on a claim of unfair competition of the play, and a third based on a claim of unfair competition of an uncopyrighted version of the play.

(*Continued on next page.*)

In a comparable situation this Court has rejected the contention that federal courts had jurisdiction to determine a cause of action under state law. *Apex Hosiery Co.* v. *Leader*, 310 US 469 (1946), was an action under the Sherman Act which involved a strike marked by extreme public disorder. At least some of the facts before the Court in that case would have been relevant to a cause of action under state law. The Court said (p. 483-484):

> "It is not denied, and we assume for present purposes, that respondents . . . violated the civil and penal laws of Pennsylvania which authorize the recovery of full compensation and impose criminal penalties for the wrongs done. *But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act and violence, as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction.*"
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> "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress . . . ." (p. 513) (Emphasis ours).

So, too, in *Hunt* v. *Crumboch*, 325 US 821 (1945), an action against a labor organization wherein plaintiff relied upon acts alleged to be violative of the Sherman Act identical to those which would have been considered under Pennsylvania's common law, this Court stated that (p. 826) "whether the respondents' conduct amounts to an action-

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(*Footnote Cont'd*)

Pendent jurisdiction was found to exist with regard to the second but not the third count. The "wrongful acts" complained of were apparently common to each count. The distinction was based on the fact that the third count "did not rest upon any federal ground and was wholly independent of the claim of copyright infringement." 289 U.S. 238, 248.

able wrong subjecting them to liability for damages under Pennsylvania law is not our concern."

See also: *United Mine Workers of America* v. *Patton*, 211 F 2d 742, 749; *Seeley* v. *Brotherhood of Painters*, 308 F 2d 52 (CA 5, 1962); *Crabb* v. *Weldon Bros.*, 164 F 2d 797 (CA 8, 1947); *French Renovating Co.* v. *Ray Renovating Co.*, 170 F 2d 945 (CA 6, 1948); *Pearce* v. *Pennsylvania R.R. Co.*, 162 F 2d 524 (CA 3, 1947); *Musher Foundation* v. *Alba Trading Co.*, 127 F 2d 9 (CA 2, 1942).

It is therefore manifest that pendent jurisdiction was erroneously found in the instant case. The federal and state claims here involved are not merely different grounds of a single cause of action. The rights asserted in the federal and non-federal claims are different in scope and concept and there are subtsantial and material differences in the facts relative to the respective claims.

There is an additional reason why pendent jurisdiction should be denied. As stated in *Hurn* and later by this Court in *Bell* v. *Hood*, 327 US 678 (1946), to invest a federal court with pendent jurisdiction of a state claim the federal claim asserted must not be wholly unsubstantial. UMW contends that the claim asserted under Section 303 by Gibbs was wholly unsubstantial.

As we have stated, this case involves primary activity of a singular form. The protest obviously concerned Grundy's efforts to replace UMW members who had worked for years for Grundy's parent corporation. The picketing and violence occurred at the situs of the dispute. Gibbs' work as a supervisor was to take place at the job site which was picketed and his work as a trucking contractor was to involve the transportation of coal from the mine—a normal part of Grundy's work. In light of these considerations, apparent in the pleadings and proof, the Section 303 claim is without substance. Every conceivable argument to the contrary has been foreclosed by *Local 761, IUE*

v. *NLRB*, 366 US 667 (1961), *NLRB* v. *International Rice Milling Co.*, 341 US 665 (1951), and *United Steelworkers* v. *NLRB*, 376 US 492 (1964).

Furthermore, it was error to find substance in the federal claim on the theory that Gibbs had status as an independent contractor as well as an employee. The picket line misconduct complained of occurred before Gibbs was to undertake performance of his trucking contract and hence none of his trucking employees were involved in the dispute. There was no dispute between UMW and Gibbs as a trucking contractor. Thus, there could have been no secondary dispute with Grundy. The fact that Gibbs as an independent contractor had the capacity to be "any other person" within the meaning of the Act was irrelevant or meaningless to the issues. It is idle to say that a substantial federal question under Section 303 is posed under such circumstances. Moreover, none of the pickets were aware of Gibbs' trucking contract. Because they were without knowledge, it was impossible for the pickets to have had the intent or specific objective required in a Section 303 violation. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 US 93, 98 (1958).

We, therefore, submit that the Sixth Circuit erred in its exercise of pendent jurisdiction.

Question No. Two

The Judgment for Damages Under State Law Is Based on UMW Participation in or Ratification of Picket Line Violence and Is Contrary to the "Clear Proof" Requirements of the Norris-LaGuardia Act and the Doctrine of Federal Preemption.

In the instant case there is evidence of violence on the first two days of the dispute, August 15 and 16, 1960. The Coal Valley miners, members of UMW Local Union 5881, gathered at the mine entrance and forcibly prevented Gibbs and some eighteen newly hired men from going into the mine area. We acknowledge that this evidence is the equiv-

alent of the evidence of misconduct which this Court considered in *United Automobile Workers* v. *Russell*, 356 US 634 (1958) and found sufficient as the basis for an award of damages under Alabama law.

This action, however, is against UMW, not Local 5881 or its individual members. Assuming the existence of pendent jurisdiction UMW contends it was error to award damages against it under state law, for (1) there was no evidence under the applicable standard of proof of UMW's participation in the violence of August 15 and 16; (2) UMW's subsequent involvement in the dispute is not clear proof of ratification of prior violence; and (3) the imposition of liability under state law to UMW's activities in the dispute conflicts with the doctrine of federal preemption.

Initially we observe that the District Court did not expressly determine the issue of UMW's participation in the violence. The District Court said (R. 46a):

> "*Without now determining whether the evidence was sufficient to permit a jury finding that UMW was responsible for the activities and violence testified to as having occurred in the Gray's Creek Area upon August 15 and 16, 1960,* it appears undisputed that the UMW became aware of such activities by the 16th. There is evidence upon which the jury could find that thereafter Gilbert participated in and supported, if not controlled, the picketing that occurred." (Emphasis ours)

Though the issue of participation was crucial, the District Court never returned to it in its lengthy opinion, except to note that the jury found that "defendant conspired to wrongfully interfere" and to hold that "there is evidence in the record, when the testimony is viewed as a whole, to support the verdict of the jury in this respect" and to state, without pointing out a basis for finding UMW responsible therefor, that "there was evidence of violence . . . which was such unlawful conduct as to support a verdict based upon common law conspiracy" (R. 55a).

The Sixth Circuit's conclusions are more explicit. Finding "circumstantial evidence from which the jury could find that District 19's representative Gilbert had a part in arranging the events of August 15 and 16", and expressing its "impression that the threat of violence remained" throughout the course of the picketing after August 15 and 16, the Sixth Circuit said (R. 535):

> "Whether it be inferred that defendant UMW through its agents had a hand in planning and carrying out the original violence, whether they ratified the violent conduct by using it to make effective the subsequent so-called peaceful picketing, or whether the violent character continued as a threat throughout the entire picketing, we believe that violence was part of the common-law tort involved, and action therefor was saved from preemption . . . "

The error in this conclusion we believe is manifest for the following reasons:

1. Absent participation in or ratification of the violent conduct by its agents it is clear that liability may not be imposed on a labor organization by reason thereof. Membership in a labor organization does not establish the members as an agent of the organization. *United States* v. *White*, 322 US 694 (1944). Nor does advocacy of the union by rank and file employees constitute them agents of the union. *Poinsett Lumber and Mfg. Co.*, 107 NLRB 234 (1953). See also *Sunset Line and Twine Co.*, 79 NLRB 1487, 1507, 1514. In a material context it has been held that "imputation of the acts of one person to another" is forbidden "except when the one is acting as agent for the other". *International Ladies Garment Workers Union* v. *NLRB*, 237 F 2d 545, 551 (CADC, 1956). Accord: *NLRB* v. *Ohio Calcium Company*, 133 F 2d 721 (CA 6, 1943), *NLRB* v. *Marshall Car Wheel, etc.*, 218 F 2d 409, 417 (CA 5, 1955).

The requirement of agency was recognized by the Sixth Circuit, for as we understand its opinion, liability was not

based upon the actions of employee-members, but rather upon its finding of participation in or ratification of violence by a representative of UMW.

2. The finding of participation or ratification is contrary, we believe, to *any* standard of evidence or rule of agency. The finding is more clearly erroneous when it is considered that the standard by which liability is to be determined with respect to the state law claim in this case is that of Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 USC 106.

Section 6 of that Act contains Congress' directive that no labor organization shall be responsible or liable "*in any court of the United States* for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."[21]

While less exacting standards of evidence concerning agency are applicable in administrative proceedings and suits under the Taft-Hartley Act [29 USC 152 (13) and 185 (e)], this Court noted that this was because in the Act's Section 301(e) Congress had declared that "For the purposes of this section, in determining whether any person is acting as an 'agent' . . . so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling" and that "This, of course, was designed to and did repeal" Norris-

[21] Section 6 reads thus:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

LaGuardia's Section 6 as to suits brought under Section 301 (29 USC 185). *Sinclair Refining Co.* v. *Atkinson*, 370 US 195, 204 fn. 17 (1962).[22] See also the Act's Section 2(13) [29 USC 152(13)]. However, since the Sixth Circuit's approval of the judgment below deals with the common-law claim under Tennessee law, it must be noted that the purpose of the Norris-LaGuardia Act was to limit "the jurisdiction and authority of courts of the United States in labor disputes". This Court has declared that Section 6's limitations "are upon all courts of the United States". *United Brotherhood of Carpenters and Joiners* v. *U. S.*, 330 US 395, 401.[23]

Consistent with Norris-LaGuardia's purpose, Section 6 manifests an intention that unions participating or interested in a labor dispute may be held liable for tortious conduct only upon a higher degree of proof than is normally required in civil cases. The use of the term "clear proof" is alone sufficient to place this type of action in a category of cases requiring evidence of a high degree of certainty. 20 Am. Jur., Evidence, Sections 1252 and 1253. Moreover, the repetitive use of the word "actual" in the enactment, as in the terms "actual participation" or "actual authorization" or ratification after "actual knowledge", evidences the demanding nature of the standard.

This Court confirmed this interpretation in the *Carpenters* case (330 US 395). Therein considering the meaning of the word "authorization", as it appears in Section 6, it said (p. 406-7):

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[22] See Section 2 of the Norris-LaGuardia Act (29 USC 102) which is set forth in Appendix C.

[23] See *A. H. Bull Steamship Company* v. *Seafarer's International Union*, 250 F. 2d 326 (CA 2, 1957), wherein the Second Circuit stated that as to Norris-LaGuardia's Section 4 (29 USC 104, which appears in Appendix C), Taft-Hartley's Section 301 did not expressly or impliedly "withdraw the restrictions of the Norris-LaGuardia Act".

" . . . We are of the opinion that the requirement of 'authorization' restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, *although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality had been expressly authorized, or necessarily followed from a granted authority, by the association or nonparticipating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence.*" (Emphasis ours)

The imputation of liability under state law in the instant case is to be tested by this standard.

3. The record in this case is positive that no UMW representative participated in or authorized the conduct of the pickets on August 15 and 16. The hasty and quiet efforts of Grundy Mining Company to open mines in the Grays Creek area with employees to be "organized" by Southern Labor Union were not known to UMW's District 19 officials and representatives, including Gilbert, until after the material events of those days had transpired. This evidence is set forth in Section B of our Statement of Evidence (pp. 9-11 herein).

It is for these reasons we contend that under no standard of evidence may liability be imposed on the theory that UMW participated in this misconduct.

The Sixth Circuit disagreed with this contention. It found a basis for an inference of participation from statements attributed to District Representative Gilbert, all made well *after* the fact. to the effect that Gibbs "was trying to get this other union in there and . . . he ain't going

to get by with it" (R. 218-219a; see also R. 257-258a, R. 127-129a). The Sixth Circuit also pointed to testimony of Gibbs with regard to the identification of union men who were present at Grays Creek on August 15 or 16. Gibbs testified (R. 126a): "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went I don't know." Gibbs also said: "he (Gilbert) didn't play any part that I seen."

This testimony is insufficient in law to warrant a verdict based on Gilbert's presence, even disregarding positive contrary evidence and Gibbs' markedly inconsistent pretrial deposition (R. 479a). Evidence must in itself have fitness to induce conviction, even if uncontradicted. *Standard Oil Co.* v. *Roach*, 21 Tenn. App. 661, 666. Thus, in *May* v. *Railroad*, 129 Tenn. 521, where a witness testified that an incident occurred September 12, according to her best recollection, but she could not be certain, the Tennessee Supreme Court held "there was no evidence to sustain the verdict because . . . the plaintiff was unable to state the date (a pivotal point in the case) any more definitely that it was either on the 12th or near that date".[24] Nor are Gilbert's alleged statements such as to warrant an inference that he planned or participated in the violence. At the time these statements were made Gilbert had a right to do what he could by lawful means to prevent the replacement of striking Coal Valley employees and forestall the replacement of UMW by a company favored union. This

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[24] It is significant that this testimony was not relied upon by the District Court nor by Gibbs in the Court of Appeals and was not discussed in briefs or argument. Indeed, in Gibbs' Main Brief in the Sixth Circuit this admittedly vague recollection or impression was tacitly abandoned with the statement that "undisputably it appears that Gilbert . . . went to Middlesboro . . ." (Gibbs' Main Brief, p. 61).

It is noted, though these matters were pointed out in UMW's petition for certiorari in this case, that nowhere in Gibbs' reply was this crucial language in the Sixth Circuit's opinion defended or even mentioned.

was the tenor of his statements and the undoubted legitimate purpose of the non-violent picketing which was going on at that time.

This evidence clearly fails to satisfy the requirement of "clear proof" of "actual participation". Indeed, the existence of clear proof is negatived by the Sixth Circuit's observation (R. 529) that, "The proofs were *sketchy* as to the defendant's responsibility for the described conduct."

The Sixth Circuit alternatively predicated liability on events subsequent to the violence. Admittedly Gilbert was directed by District 19 to return to the field and to advise the employees to conduct themselves in a lawful and peaceful manner. And though the number of pickets was subsequently limited and no picket line disorder thereafter occurred (see the Statement of the Evidence herein, pp. 14-16), the Sixth Circuit found in the conduct of Gilbert evidence of ratification of the prior violence because, as it was said, UMW thereby secured the "fruits of violence", and because "we gain the impression that the threat of violence remained throughout the succeeding days and months." The Court said (R. 535):

> " . . . The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door."

Laying aside the questions of whether an "impression", in these circumstances, partakes of clear proof of ratification, or of Gilbert's authority to ratify, we submit that the considerations utilized by the Sixth Circuit place a labor organization, confronted with the difficult task of representing and advising employees in these circumstances, in an impossible situation. UMW was faced with the choice

of abandoning its members or of restoring order. It did the latter and the fact is that from that point on no violence occurred.

UMW obviously could not erase what had transpired. We do not understand, however, that in these circumstances it was required to forego the right to picket in an orderly manner. As this Court held in *Youngdahl* v. *Rainfair, Inc.*, 335 US 131 (1957), it is one thing to restrain the illegal aspects of picketing under state law, but it is another to restrain all picketing. The Sixth Circuit in effect did just that, for it found in the subsequent picketing a basis for damages under state law.

We insist that there is nothing in a union's instructions not to engage in violence and not to engage in mass picketing, coupled with the absence thereof, which warrants a finding of "adoption or affirmance . . . of a prior act" as is required to establish ratification. 3 Am. Jur. 2d, Agency, Sec. 160.

A question of ratification somewhat similar to that here was considered by this Court in *United Mine Workers of America* v. *Coronado Coal Company*, 259 US 344 (1922). The Court said (p. 394):

> "It does appear that in 1916, after Stewart, the president of District 21, had been convicted of conspiracy to defeat the injunction issued to protect the Prairie Creek mines in this conflict, and had gone to the penitentiary and was pardoned, White, the national president, wrote a letter thanking the president for this, and that subsequently he appointed Stewart to a position on a district committee. It would be going very far to consider such acts of the president alone a ratification by the International Board, creating liability for a past tort."

UMW had a legitimate reason to involve itself, wholly apart from ratification of the prior violence. Simply to insist upon and achieve order was a sufficient reason. The circumstances under which the company sought to replace

UMW members was another. Indeed, the NLRB (though not the Sixth Circuit) sustained UMW's subsequent charge that the coal companies unlawfully assisted Southern Labor Union in their combined efforts to displace the striking Coal Valley employees. The doctrine of ratification is therefore inapplicable for "Ratification cannot . . . be inferred from acts which may be readily explained without involving any intention to ratify." 3 Am. Jur. 2d, Agency, Section 170. See also *UMW* v. *Coronado Coal Company*, 259 U.S. 344, *International Ladies Garment Workers* v. *NLRB*, 237 F. 2d 545 (CADC, 1956).

Reliance on ratification is misplaced because of the absence of evidence of an intention to ratify, as we have shown. It is also error because there is no evidence that the Coal Valley miners were purporting to act as agents of UMW on August 15 and 16. In the absence of this fact, the doctrine of ratification is inapplicable. 3 Am. Jur. 2d, Agency, Sec. 171. It is also inapplicable because of the absence of evidence to the effect that UMW had knowledge of all of the material facts concerning August 15 and 16, hence another fundamental element of ratification is lacking. 3 Am. Jur. 2d, Agency, Sec. 173.

4. The judgment based on state law herein is contrary to the doctrine of federal preemption.

Federal preemption has played a notable role in litigation growing out of labor controversies. Decisions are to the effect that absent overriding state interest, such as that involved in the maintenance of domestic order, state courts and federal courts in passing on state law claims, must defer to the exclusive competence of the National Labor Relations Board where the subject matter of the litigation is arguably subject to the protection or prohibitions of the National Labor Relations Act. Preemption has been found applicable to claims based on state law for equitable relief, *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957), as well

as to claims for damages, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964).

While state law is not preempted in cases where there is an overriding state interest involved and violent primary activity has been found a basis for application of state law notwithstanding the same conduct may also be regulated by Sec. 8(b)(1)(A) of the Act [*United Construction Workers* v. *Laburnum Corp.*, 347 US 656 (1954), and *United Automobile Workers* v. *Russell*, 356 US 634 (1958)], judgments for damages under state law were sustained in both of these cases because, and only because, as this Court stated in the *Garmon* case, 359 US 236, 247 fn. 6 *state jurisdiction* was exercised only to compensate for the "direct consequences of violent conduct", and that "to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." Moreover, *Laburnum* and *Russell*, upon which the Sixth Circuit expressly relied, are not apposite herein. *Laburnum* and *Russell* involved activities regulated, not by Section 303 or its counterpart, Section 8(b)(4), but by Section 8(b)(1)(A), 29 USC 158(b)(1)(A), and constituted violent primary conduct alone for which Congress had provided no action for damages. In *Laburnum* this Court reasoned that for Laburnum's damages Taft-Hartley "sets up no general compensatory procedure." In the instant case, which involves also secondary activity, Congress was not indifferent to the phase of damages resultant from such conduct, whether peaceful or violent, and provided therefor in Section 303. *Laburnum* and *Russell* are not applicable for an additional reason, namely, because state jurisdiction therein was exercised only to compensate for "the direct consequences of violent conduct" (*Garmon*, 359 US 236) and not, as in the instant case, for *total* strike activity, including *non-violent* conduct.

While the Sixth Circuit found "no need" to review the determination of the secondary boycott claim, it nonetheless employed its "impression that the threat of violence" and the "aura of violence remained" (R. 535) on which to warrant its conclusion "that violence was part of the common-law tort" and therefore federal preemption was inapplicable.

However, both the jury and the district court found that the secondary boycott statute (Section 303) had been violated and if it be true, as the Sixth Circuit states (R. 532-33a), that the *"same facts"* were available to determine whether a secondary boycott or a common-law tort was committed, then clearly the doctrine of federal preemption precluded jurisdiction over the common-law claim of violent secondary activity. Further, since, as the Sixth Circuit professed, the *"same facts"* were available for either claim, it is evident that the Sixth Circuit fails to distinguish between violence which attends primary picketing and that which accompanies secondary activity, in order to find jurisdiction of a state common-law tort claim. This distinction is of significance herein where the jury's finding of punitive damages and the district court's sanction of a portion thereof are based upon the belief that picketing fell within the conduct condemned under Section 303. The Sixth Circuit's affirmance of punitive damages as allowed by the district court and its rejection of UMW's argument that *Morton* (377 US 615) demanded a separation of the facts of federal and non-federal claims, because, as the Sixth Circuit said, *Morton* involved no charge of state common-law violence, make clear the Sixth Circuit's belief that violence, whether accompanying (1) primary picketing or (2) secondary picketing, gives rise to a common-law tort claim warranting punitive damages.

This Court made clear in *Morton* that punitive damages for Section 303 violations "conflict with the congressional judgment, reflected both in the language of the federal

statute and in its legislative history" and that "insofar as punitive damages . . . were based on secondary activities which violated only state law, they cannot stand, because . . . substantive state law in this area must yield to federal limitations" (377 US 260-61). *Morton* cites with approval the Fourth Circuit's *UMWA* v. *Patton*, 4 Cir., 211 F. 2d 742, 747-50, which rejected a punitive damage award under Section 303.

Clearly it was not Congress' intention that violence accompanying secondary picketing be extracted from such activity so as to become the basis in whole or in part for a separate and nonfederal cause of action or claim for punitive damages. Yet, this is precisely what the Sixth Circuit has achieved. Its result counters not only Congress' express language in Section 303 that a person damaged by conduct proscribed therein "shall recover the damages by him sustained", but it conflicts with the rule that "Whatever Congress determines, either as to a regulation or the *liability* for its infringement *is exclusive of state authority.*" *Sherlock* v. *Alling*, 93 US 99, 104.

We have shown that UMW neither authorized, participated in nor ratified the unlawful acts of violence which were shown to have occurred at the outset of this controversy. To the contrary UMW restored order and supported its members in picketing which was carried on in a lawful manner. It did these things to accomplish a lawful purpose—to obtain job protection for its members and other benefits of a collective bargaining agreement.

Even if UMW somehow did ratify the unlawful conduct of August 15 and 16, it does not follow that State law may be applied so as to condemn UMW's entire effort in this controversy. Elsewhere we have stated the various facts that were shown in support of Gibbs' state cause of action. These facts related to peaceful picketing of long duration, efforts to obtain a collective bargaining agreement, UMW's policy with respect to a uniform collective bargaining agree-

ment, the relief given by UMW to its members during the course of this controversy, as well as other matters. Obviously these matters upon which the judgment rested, at least in part, were beyond the scope of state regulation.

This Court has rejected the so-called "totality of effort rule", the use of which was implicit in this case. As was stated by this Court in the *Morton* case (377 U.S. 261-62):

> ". . . the District Court was without power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere".

The conduct of UMW here before the Court was traditional union activity and is protected by the Labor Management Relations Act. So viewed, it is clear without argument that the judgment based thereon conflicts with the preemption doctrine. Furthermore, the judgment affirmed by the Sixth Circuit includes both compensatory and punitive damages and was entered for total strike activity, some of which admittedly was peaceful. *Garner* (346 US 483) denies the availability of jurisdiction for damages under a common-law claim which is based upon peaceful conduct.

Morton, we believe, represents a logical extension of this Court's decisions in the Garmon and Rainfair cases, for in the latter case it was held that federal preemption continues operative notwithstanding the occurrence of public disorder in the labor dispute.

It must be remembered too that the *Laburnum* and *Russell* exceptions to the doctrine of federal preemption authorizes only the award of damages which are "the direct consequences of violent conduct". *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959). But, Gibbs' jury award of $60,000 as compensatory damages for a state law violation, though reduced to

$30,000 by the district court, gave Gibbs a great deal more than compensation for the direct consequences of *violent* conduct, since none of the violence alleged imparted upon Gibbs personally and he suffered no physical injury.

For these reasons we earnestly submit that the judgment herein is contrary to the doctrine of federal preemption.

Question No. Three

UMW Is Entitled to a New Trial Because of the Closing Argument of Gibbs' Counsel.

UMW made a motion for a new trial because of the highly inflammatory and prejudicial closing argument made by plaintiff's counsel (R. 37a).

The District Court found the argument improper stating that "an advocate may share his client's *prejudices* (emphasis supplied) against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence". However, the Court found the argument was not so prejudicial as to warrant a new trial but was of the opinion it should be taken into consideration upon the issue of excessiveness of the verdict.

The District Court noting Gibbs' employment contract was terminable at will, found the jury's award of $60,000 clearly excessive to the extent of $30,000, and in reviewing the evidence and "reflecting upon the argument of the plaintiff's counsel" found excessive in the amount of $55,000 the size of the award of $100,000 for punitive damages. The District Court's suggested remittitur of $30,000 on the employment contract and $55,000 of the punitive award was accepted by Gibbs.[25]

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[25] The District Court found no credible evidence to support the award of $14,029 for loss of his trucking contract and therefore sustained UMW's motion for a directed verdict on this issue.

The Sixth Circuit, although recognizing as sound those decisions[26] holding that where an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error, held that "The peculiar nature of many of the remarks leads us to conclude that he (the District Court) found the remarks to fall within the very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits" (R. 536a).

The closing argument was replete with assertions calculated to arouse every conceivable sentiment against UMW. It was elaborately asserted that UMW was utterly without respect for the law—that "they will do what they please, the law doesn't mean (snaps fingers) that to them" (R. 482a); that UMW was utterly heartless and without regard as to whether innocent people starved (R. 486-487a); its very efforts to defend itself in this case was a part of the scheme "to bludgeon Gibbs" (R. 491a); that it was the "bugger" responsible for poverty in the coal fields (R. 486-487a). Virtually the entire argument was an appeal to prejudice to the jury. Typical of the "waving the bloody shirt" tactics employed is the following excerpt from the argument: "Now what this International Union has done, using these locals, has conspired to destroy that man, to bludgeon him, the same thing as taking a baseball bat and say we defy you Paul Gibbs, to prove this case. We'll beat you to a bloody pulp before you are through. If we can't do it with shotguns, we'll use every legal means to do it, and we'll either bludgeon you out of this case or we'll starve you out, one of the two." (R. 490a).

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[26] *Minneapolis, St. P. & S.S.M. Ry.* v. *Moquin*, 283 U.S. 520, 75 L. ed. 1243 (1931); *Ford Motor Co.* v. *Mahone*, 205 F. 2d 267 (CA 4, 1953); *Brabham* v. *Mississippi ex rel. Smith*, 96 F. 2d 210 (CA 5, 1938), cert. denied, 305 U.S. 636, 83 L. ed. 409 (1938); *National Surety Co.* v. *Jean*, 61 F. 2d 198 (CA 6, 1932).

There were neither allegations nor proof of destruction of property in this case, yet counsel's argument contained the following statement (R. 491a):

> "Certainly, they want you to be light on them so they can pay it back and go over there and blow up another mine . . .".

UMW was compared unfavorably with Hungary and Russia (R. 493a). Its dues policy was described as a scheme to gain profits. Counsel argued "... this union has been collecting $4.50 per month from each one of these members, some of them as long as thirty years. I haven't seen them sending any money back to them, have you? What this International seeks to do is profit . . ." (R. 485a).

The argument produced its calculated result—a verdict, and an excessive one. The same emotion that caused this jury to be excessive in the amount of its award was present when it made its determination against UMW on the merits. The human mind is not and cannot be compartmentalized to react as the Sixth Circuit's decision would require.

The field of labor-management relations is one that is particularly vulnerable to this type of appeal. The role that organized labor plays in our economic, political and social life and the regulation of that role is still a matter of continuing controversy. Combined with this sensitive field is a complex, vague and difficult law to apply. The Sixth Circuit described as "an effective understatement" this Court's observation in the *Electrical Workers* case [*Local 761, IUE* v. *NLRB*, 366 U.S. 667, 673 (1961)] that the distinction between legitimate "primary activity and banned secondary activity does not present a glaringly bright light". Surely, such issues must be free of prejudicial determinations.

Furthermore, the issue of union responsibility for the acts of employee members, particularly when enmeshed

with the general and vague concept of conspiracy, adds more complexity and more confusion. Present here also was the Sixth Circuit's notation that the "proofs were sketchy as to defendant's responsibility for the described conduct" (R. 529). This, too, comes within the category of an "effective understatement".

There was no assertion or finding that the excesses of the jury was based upon any factor other than the appeal to prejudice. UMW assets it is entitled to a verdict above suspicion on all issues and, as expressed by the Fourth Circuit in *Ford Motor Co.* v. *Mahone*, 205 F. 2d 267, 272, "Verdicts of juries must be kept above suspicion and a judge should not hesitate to set a verdict aside where it is so grossly excessive as to be explained only on the basis of sympathy or prejudice . . . which brings the fairness of the verdict under grave suspicion." Litigants are entitled to a fair judgment on all issues. And where, as here, argument is found to have been based upon an appeal to prejudice with an adverse effect upon the size of the verdict it should be set aside, for the means employed "may be quite effective to beget a wholly wrong verdict as to produce an excessive one." *Minneapolis, St. Paul & S.S.M. Railway Co.* v. *Moquin* (1931), 283 U.S. 520.

The narrow distinction employed by the Sixth Circuit in approving the use of a remittitur serves neither the justice of the case nor the administration of justice as it is reflected in trial practice.

Question No. Four

Having Submitted an Erroneous Theory to the Jury the Verdict May Not Be Sustained on Another Theory Which Was Proper to Submit to It.

The District Court refused to grant UMW's Motion to Dismiss Gibbs' complaint (R. 23a, 77a, 67a, 71a) and erroneously instructed the jury that if the object of the union's activity was to force or to require Grundy to cease doing business with Gibbs as a mine superintendent or as

a trucking contractor then such conduct was in violation of the Labor Management Relations Act (R. 496a, 501a).

In addition, the District Court instructed the jury that Gibbs could recover damages for the loss of his employment contract if they found UMW responsible for an illegal secondary boycott *or* a wrongful interference with this contract under the state common law (R. 501a).

The verdict form required the jury to answer eleven interrogatories (R. 31a, 34a). In answering these it found UMW violated both federal and state law as to Gibbs as a mine superintendent and as a trucking contractor.

The District Court agreed with UMW's contention that it erred in submitting the issue to the jury on the federal statutory claim as mine superintendent but disagreed with UMW's assertion that it was error to submit the issue as to Gibbs as a trucking contractor. Furthermore, it refused to grant UMW's request for a new trial finding the verdict could be sustained under the theory of his capacity as a trucking contractor or could be sustained under state law[27] (R. 53-55a).

UMW asserts that having submitted an erroneous theory to the jury it could only be cured by a new trial even though the verdict might be sustained on another theory which was proper to submit to it. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19; *Local 978, United Bro. of Carpenters & Joiners* v. *Markwell*, 305 F. 2d 38 (CA 8, 1962). The Sixth Circuit did not refer to this issue.

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[27] The District Court held that employees and supervisors of any struck or picketed primary employer who lose their employment are not within the meaning of "other persons" and would have no statutory action for any loss so occasioned but Gibbs in his capacity as an independent trucking contractor would be an "other person" within the meaning of the Act and would be entitled to a statutory action under the law. (R. 53a, 54a).

It is impossible to determine from the verdict form whether the jury found Gibbs sustained his loss of the employment contract because of the secondary boycott as to Gibbs in either of his capacities or because of the common law violation or any part of it. The jury may well have believed that only the picketing subsequent to August 16 constituted a secondary boycott and that this picketing caused Gibbs to lose the eight years of salary it awarded him. It may have reasoned that the activities of August 15 or 16 violated the state common law and not the federal law but he suffered no loss for this conduct because he was paid $300 by Grundy for this time (R. 121a).

UMW therefore submits a new trial should be granted.

CONCLUSION

UMW submits this Court should reverse and set aside the judgment of the Sixth Circuit herein complained of (R. 540a), as well as the District Court's judgment of August 28, 1963 (R. 59-60a), set aside the jury verdict, and remand the case with directions that judgment be entered for UMW, for the reasons discussed in Question Two; or, alternatively, with instructions to dismiss for want of jurisdiction, for the reasons discussed in Question One; or, in the further alternative, that UMW be granted a new trial, for reasons discussed in Questions Two, Three and Four.

Respectfully submitted,

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APPENDIX A

Labor Management Relations Act, 1947 (29 USC):

Sec. 158. Unfair labor practices

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or ap-

proved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b) (4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, c. 120, Title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, Title VII, § 704(e), 73 Stat. 545.

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[1] So in original. Probably should read "of."

APPENDIX B

Section 12 of H. R. 3020 as found in Legislative History of the Labor Management Relations Act, Vol. 1, pp. 204-207:

"SEC. 12. (a) The following activities when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business, or picketing or besetting the home of any individual in connection with any labor dispute.

"(2) Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer.

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises;

"(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices;

"(C) any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law.

"(4) Any conspiracy, collusion, or common arrangements between competing employers to fix or agree to terms or proposed term of employment of their employees, or to subject such terms or proposed terms of employment to common control or approval, not permitted as to their employees, or as to the representatives of their employees, with respect to the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such employees.

"(b) Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall have any application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful.

"(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to

the same extent as a person found to have engaged in an unfair labor practice under section 8(b) or 8(c).

"(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court issued hereunder, shall be construed to require any individual to perform labor or service without his consent."

APPENDIX C

29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

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29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.